

REPORT - PLANNING COMMISSION MEETING
January 9, 2003

Project Name and Number: Hassett Corporation Yard Appeal (PLN2003-00073/ MIS2003-00606)

Applicant: Eric and Felicia Hassett

Proposal: Appeal staff determination that a conditional use permit is required when a non conforming use is changed to a similar use.

Recommended Action: Deny appeal

Location: 401 Orchard Drive in the Niles Planning Area

Assessor Parcel Number(s): 507 056001101

Area: .47 acre parcel

Owner: Eric and Felicia Hassett

Agent of Applicant: Peter MacDonald, Hassett Attorney

Environmental Review: This project is categorically exempt from CEQA review under Section 15301, Existing Facilities

Existing General Plan: Residential Density, 4-6 dwelling units per acre

Existing Zoning: R-1-8 (H-I), Single Family Residential with Hillside combining Overlay

Existing Land Use: Caretakers mobile home, single family residence, accessory structures, garage and parking lot.

Public Hearing Notice: Public hearing notification is applicable. A total of 51 notices were mailed to owners and occupants of property within 300 feet of the site on the following streets: Orchard Drive, Orangewood Drive, Timpanogas Circle, Canyon Heights Drive, and Goodrich Way. The notices to owners and occupants were mailed on December 30, 2002. A Public Hearing Notice was delivered to The Argus on December 18, 2002 to be published by December 18, 2002.

In addition, One public hearing notice was mailed as a courtesy to an interested party.

Executive Summary: The Planning Commission is being asked to consider an appeal of a Zoning Administrator determination that a Conditional Use Permit is required for the proposed establishment of a non-conforming use, the Hassett corporation yard for a contracting business, on the site of a previous non-conforming use, a lumber company. The applicant contends that the property was previously a light industrial use and that the proposed use is light industrial use and that therefore the zoning ordinance does not require a Use Permit for the proposed use. Based on past practice, the basis for making a determination of continuing non-conformity is the specific character of the use, and not broad zoning categories, such as "light industrial." Accordingly, the Zoning Administrator determined that the uses were indeed different and indicated that the owner must seek a Conditional Use Permit to establish the proposed use.

Background and Previous Actions: The applicant's request for a business tax license for a corporation yard on said property has been withheld pending further investigation and review. The property is located in a residentially zoned district which does not allow or conditionally allow corporation yards. Uses established prior to the creation of the zone may be allowed to remain indefinitely as non-conforming uses. Fremont Municipal Code (FMC) Section 8-2168.2 defines a nonconforming use as "a use which, when commenced, complied with use regulations of the district in which such use was commenced, and which does not conform to the presently existing use regulations of the district where the use is

being conducted or carried on.” At issue is whether the nonconforming status of the previous businesses could be extended to the proposed business, the Hassett Corporation Yard.

By long standing practice, the Zoning Administrator has only allowed the non-conforming status of one business to be transferred to virtually the same business. In other words, the name and/or owner of a non-conforming business can be changed without the requirement for a Use Permit. When any significant modification to the use is proposed, a Use Permit is required, based on Section 8-22302 (b) of the FMC, as follows:

Section 8-22302 (b): *“A nonconforming use of a structure or building may be changed to a similar use or a use of lesser intensity upon approval of a conditional use permit by the planning commission. As used in this section a use of lesser intensity shall mean a use which is found by the commission to require fewer employees or less public contact, less storage capacity or less service or demands on public facilities or energy, and is more compatible with adjacent and future land uses.”*

In evaluating a change in a non-conforming business, staff reviews the history of the previous business. In order to evaluate the factors identified above. Prior to making any determination regarding the applicant's proposed use, the applicant was asked to show 1) continuous business activity on the property 2) a full description of the proposed Hassett Corporation Yard. Continual business activity is defined as a business not ceasing for 12 consecutive months or for 18 months in any consecutive period of thirty-six months.

On June 21, 2002, staff met with the applicant to address the issue of nonconformity of the proposed business. The applicant provided information showing recent business activity including proof of insurance, business license, letters, and business tax receipts (Exhibit “B”). A review of the information showed a lapse in business operation between September 18, 1995 and November 1, 1996. The applicant subsequently provided evidence that Olympic Screen Crafts, a commercial printer and print management agency, which used the accessory buildings on the property for warehousing, had occupied the premises during this time period and was eventually evicted due to failure to pay rent.

The applicant also provided evidence that Osborne Lumber company was insured under a commercial package policy for warehouse from 11/01/94 through 11/01/2001. The applicant also presented a letter from the owner of Osborne Lumber, stating that Osborne Lumber had occupied the premises until the sale to Eric and Felicia Hassett in February 2001. Staff requested additional information about the proposed business, the Hassett Corporation Yard, such as the number of employees and hours of operation, which the applicant provided at a later date (Exhibit “C”, Letter dated September 6, 2002).

On August 18, 2002, the Zoning Administrator sent a letter addressed to the applicant's attorney finding that there had been ongoing commercial or industrial use of the property. However staff could not conclude that the previous use of the site for a lumber yard activity was essentially the same as the use of the site for a corporation yard for a contracting business. In fact, anecdotal evidence staff has gathered to date indicates that the lumber company use was not an active use and did not have the number of employees or activity as proposed by the use of the site for a corporation yard for a contracting business. Thus, the Zoning Administrator found that the property was proposed to change from a use involving storage of lumber and perhaps other activities (undocumented) to use as a corporation yard for a contractor and informed the applicant's attorney that a conditional use permit would be required for such a change.

On November 4, 2002, city staff received a notice of appeal from the applicant's attorney requesting staff to reconsider the Zoning Administrator determination or schedule appeal hearing.

Project Description: The proposed use will involve on-site storage of equipment and materials associated with a construction business in an existing 6,870 square foot garage and on a paved open area on the site. Several structures exist on the property, including a rental house on the southern corner of the property on Orchard Drive and Goodrich Way, an (unpermitted) mobile caretakers home fronting Goodrich Way, and a large garage with attached carport, office space, and draftsman room. The structures combined account for approximately 42% of the on-site coverage. There is a paved open space area on the property used in the past for employee parking and storage of equipment and materials. Ingress and egress to the site is via an electronic gate located between the garage and rental house off of Orchard Drive. A fence

and landscaping are in place on the perimeter of the property concealing the interior open space and storage from outside view.

The applicant states that activities associated with the corporation yard would occur in the existing garage and office space. The business would employ ten full-time employees, although the number of employees would fluctuate based on business cycles. The employees would be using the site to drop off or pick up construction equipment.

Project Analysis:

Zoning Regulations: This appeal is predicated on a Zoning Administrator determination that a Conditional Use permit is required when a nonconforming use is changed to a similar use. Section 8-22303 (a) states that "A non-conforming use of a structure or building may be maintained indefinitely, except as otherwise provided herein". The Zoning Administrator has consistently determined that continuation of use means essentially the continuation of the same business. The name of the business or the owner may change, but not the business. This is supported by other discussion in the non-conforming section which refers to prohibitions on uses expanding in any manner (Section 822303 (c)), and the definition of a change in use to only those that involve less impact on the community. The appellant has indicated that in his view the previous and proposed uses are both "light industrial" and that there is therefore no change in use and that a Use Permit is not required. The Zoning Administrator has not relied on a general definition of "use" (e.g., "light industrial") because there is a very wide range of impacts from uses called "light industrial." To allow one non-conforming light industrial use to replace another would be contrary to the clear intent of the non-conforming sections of the ordinance to avoid any intensification of a non-conforming use.

Enclosures:

Exhibit "A" (Site Plan, Floor Plan)

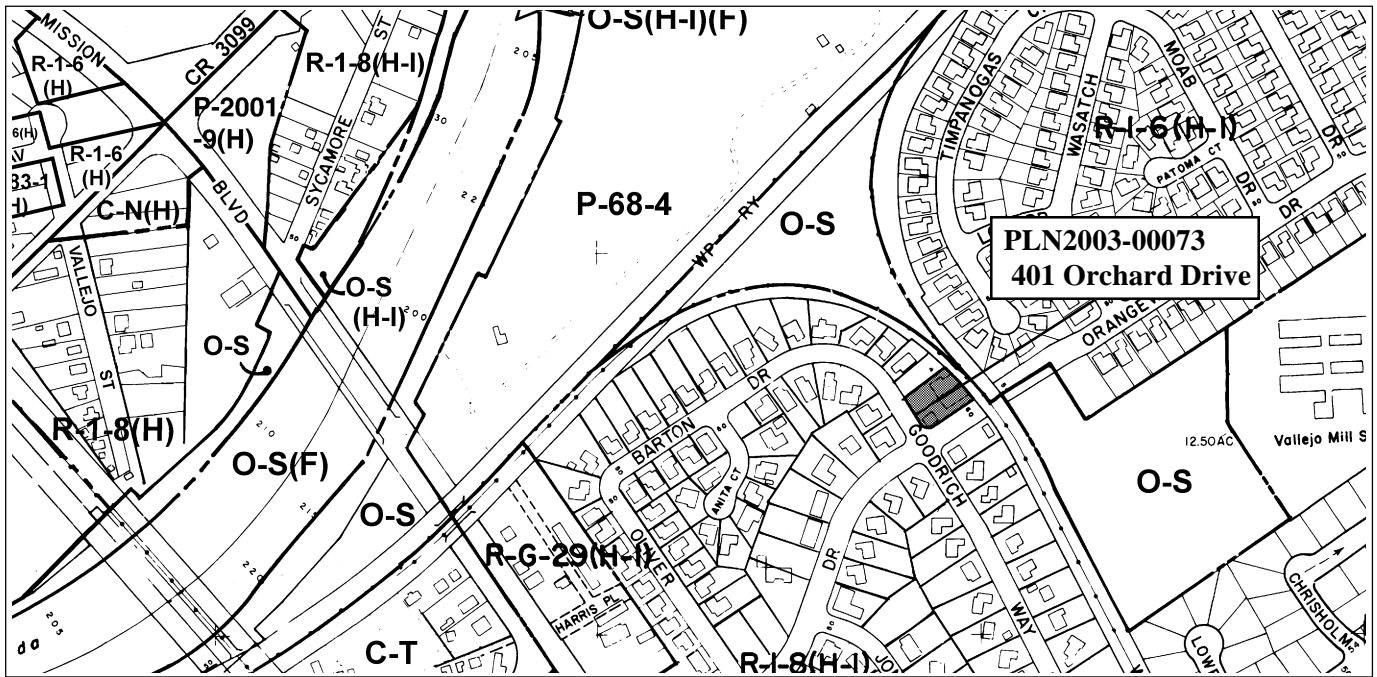
Exhibit "B" (Proof on continual business activity - Letter from Kevin Fogerty regarding Osborne Lumber, Business tax certificates, Letter from Kevin Fogerty regarding Olympic Screen Crafts, January 10, 2002 letter confirming insurance coverage (11/1/96-11/1/01), June 12, 2002 letter confirming insurance coverage (11/1/94-11/1/01), Letter from Chuck Pell to renew lease agreement, Notice of Termination, Lease and Addendum to Lease)

Exhibit "C" (Correspondence letters between staff, Eric Hasset, and Peter MacDonald, Hassett Attorney)

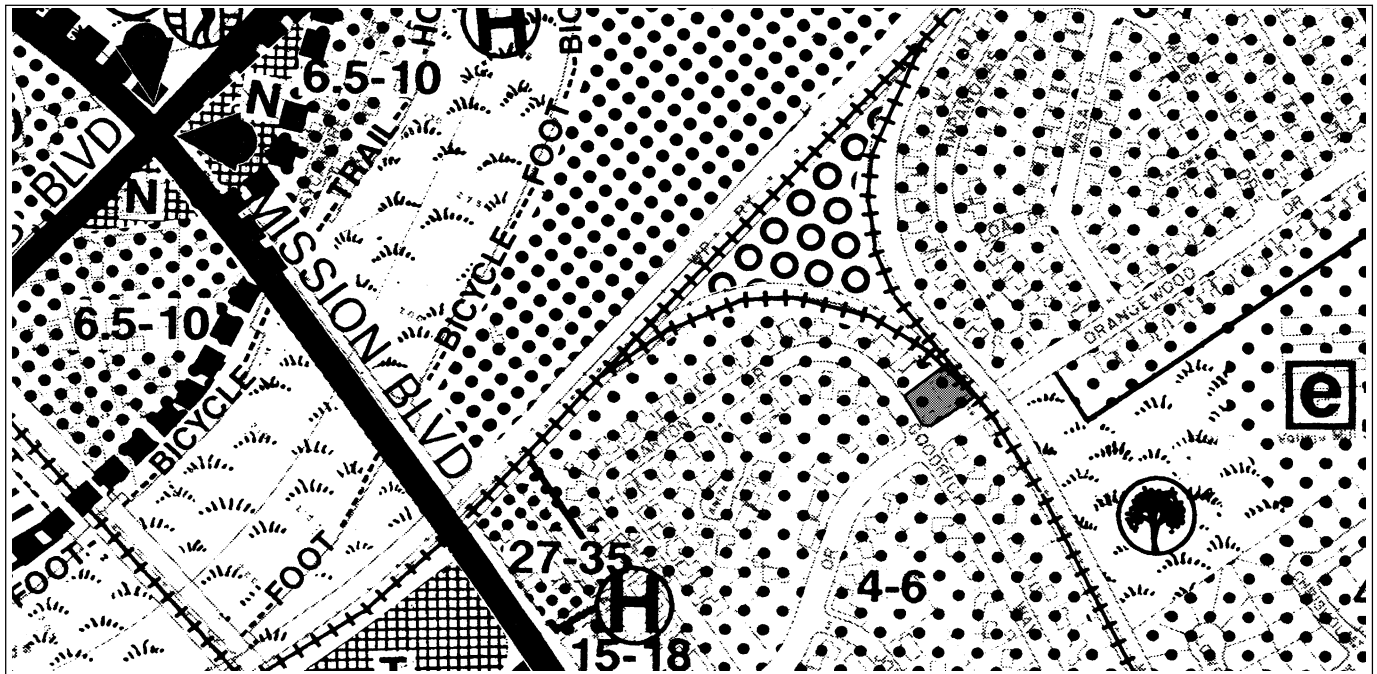
Recommended Actions:

1. Hold Public Hearing
2. Deny appeal and direct applicant to apply for a conditional use permit pursuant to the requirements of FMC Section 8-22303.

INFORMATIONAL



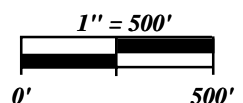
Existing Zoning



Existing General Plan

Project Number: PLN2003-00073 (CUP)
Project Name: Hassett Corp Yard
Project Description: Appeal of staff determination that a Conditional Use Permit is required when a nonconforming use is changed to a similar use.

Note: Prior arrangements for access are not required for this site.



DL